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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1941.

No. 941

THE D. W. KLEIN COMPANY, a Corporation, *Petitioner*,

v.

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

Petition For Writ Of Certiorari To The United States Circuit Court of Appeals For The Seventh Circuit.

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The undersigned, on behalf of the above named petitioner, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered November 28, 1941, in the above entitled proceedings, docketed therein as No. 7634.

OPINIONS.

The opinion of the United States Board of Tax Appeals is reported at pages 98 *et seq.* of the record. The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 123 F. (2d) 871, and found at pages 159 *et seq.* of the record herein.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Seventh Circuit was entered on November 28, 1941. The jurisdiction of this Court is invoked under the provisions of Section 347(a), Title 28, U. S. C. A.

QUESTIONS PRESENTED.

The principal question presented in this case is:

1. Whether petitioner is a corporation resulting from a reorganization of the Royal Cloak Company within the meaning of Sections 112(i) and 113(a)(7) of the Revenue Act of 1932, c. 209, 47 Stat. 196, 198.

If the transactions here involved do not constitute a reorganization, then the following questions are presented:

2. Whether Section 213 (f) of the Revenue Act of 1939 (c. 247 Title II, 53 Stat. 870) prevents the addition to and increase of the basis of property acquired by petitioner in exchange for stock and the assumption of certain liabilities by the amount of cash subsequently paid in satisfaction of such liabilities.

3. Whether the bid price ($52,125) made by the Class A preferred stockholder of the bankrupt corporation for property purchased at foreclosure sale, or whether the fair market value of the said property ($84,250), is the proper basis to petitioner, the transferee corporation, for determining gain or loss upon the subsequent sale or disposition of said property.

4. Whether expenditures made by petitioner for acts done that were motivated by a purpose to protect and promote the business are proper deductions from income as ordinary and necessary expenses, notwithstanding such expenditures were made to creditors who had filed claims in bankruptcy against the predecessor corporation.

STATUTES INVOLVED.

REVENUE ACT OF 1932.

Supplement B—Computation of Net Income.

SEC. 111. DETERMINATION OF AMOUNT OF GAIN OR LOSS. (C. 209, 47 Stat. 195; 26 U.S.C.A. 111 note.)

* * * * * * * * * *

SEC. 112. RECOGNITION OF GAIN OR LOSS. (C. 209, 47 Stat. 196; 26 U.S.C.A. 112 note.)

(a) General rule.—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111 shall be recognized, except as hereinafter provided in this section.

(b) Exchanges solely in kind.—

* * * * * * * * * *

(4) Same—Gain of corporation.—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(5) Transfer to Corporation Controlled by Transferor.—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

(c) Gain from exchanges not solely in kind.—

(1) If an exchange would be within the provisions of subsection (b) (1), (2), (3), or (5) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

* * * * * * * * * *

(i) Definition of reorganization.—As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS. (C. 209, 47 Stat. 198; 26 U.S.C.A. 113, note.)

(a) Basis (Unadjusted) of Property.—The basis of property shall be the cost of such property; except that—

* * * * * * * * * *

(6) Tax-free Exchanges Generally.—If the property was acquired upon an exchange described in section 112 (b) to (e), inclusive, the basis shall be the same as in the case of the property exchanged, decreased in the amount of any money received by the taxpayer and increased in the amount of gain or decreased in the amount of loss to the taxpayer that was recognized upon such exchange under the law applicable to the year in which the exchange was made. If the property so acquired consisted in part of the type of property permitted by section 112(b) to be received without the recognition of gain or loss, and in part of other property, the basis provided in this paragraph shall be allocated between the properties (other than money) received, and for the purpose of the allocation there shall be assigned to such other property an amount equivalent to its fair market value at the date of the exchange. This

paragraph shall not apply to property acquired by a corporation by the issuance of its stock or securities as the consideration in whole or in part for the transfer of the property to it;

(7) Transfers to Corporations Where Control of Property Remains in Same Persons.—If the property was acquired after December 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. This paragraph shall not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by the issuance of stock or securities of the transferee as the consideration in whole or in part for the transfer;

(8) Property acquired by issuance of stock or as paid-in surplus.—If the property was acquired after December 31, 1920, by a corporation—

(A) by the issuance of its stock or securities in connection with a transaction described in section 112(b) (5) (including, also, cases where part of the consideration for the transfer of such property to the corporation was property or money, in addition to such stock or securities), or

(B) as paid-in surplus or as a contribution to capital,

then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made.

REVENUE ACT OF 1939.

SEC. 213. ASSUMPTION OF INDEBTEDNESS. (C. 247, Title II, 53 Stat. 870, 26 U.S.C.A. Internal Revenue Acts p. 1177.)

(f) Assumption of liability not recognized under prior acts.

(1) Where upon an exchange occurring in a taxable year ending after December 31, 1923, and beginning before January 1, 1939, the taxpayer received as part of the con-

sideration property which would be permitted by subsection (b) (4) or (5) of section 112 of the Revenue Act of 1938, or the corresponding provisions of the Revenue Act of 1924 or subsequent revenue Acts, to be received without the recognition of gain if it were the sole consideration, and as a part of the consideration another party to the exchange assumed a liability of the taxpayer or acquired from the taxpayer property subject to a liability, such assumption or acquisition shall not be considered as "other property or money" received by the taxpayer within the meaning of subsection (c) (d) or (e) of section 112 of the Revenue Act of 1938, or the corresponding provisions of the Revenue Act of 1924, or subsequent revenue Acts, and shall not prevent the exchange from being within the provisions of subsection (b) (4) or (5) of section 112 of the Revenue Act of 1938, or the corresponding provisions of the Revenue Act of 1924 or subsequent revenue Acts; *except* that if, in the determination of the tax liability of such taxpayer for the taxable year in which the exchange occurred, by a decision of the Board of Tax Appeals or of a court which became final before the ninetieth day after the date of enactment of the Revenue Act of 1939, or by a closing agreement, gain was recognized to such taxpayer by reason of such assumption or acquisition of property, then for the purposes of section 112 of the Revenue Act of 1938, and corresponding provisions of the Revenue Act of 1924 or subsequent revenue Acts, such assumption or acquisition (in the amount of the liability considered in computing the gain) shall be considered as money received by the taxpayer upon the exchange.

(2) Paragraph (1) shall be effective with respect to the Revenue Act of 1924 and subsequent revenue Acts as of the date of enactment of each such act.

SEC. 23. DEDUCTIONS FROM GROSS INCOME. (C. 209, 47 Stat. 179, 26 U.S.C.A. 23, note.)

In computing net income there shall be allowed as deductions

(a) Expenses. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *.

STATEMENT.

The petitioner was organized and incorporated under the laws of the State of Illinois on February 22, 1932, to engage in the general mercantile or merchandising business, with an authorized capital stock of 4000 shares common and 4000 shares preferred stock, each of the par value of $25 per share; and petitioner issued 2085 shares of common stock to D. W. Klein and her nominees and assumed obligations of D. W. Klein in the amount of $32,125 for and in consideration of the conveyance and transfer to it on February 25, 1932, of all of the merchandise, fixtures, accounts receivable and other assets of the Royal Cloak Company and the Klein Clothing Company acquired by D. W. Klein from the Trustee in Bankruptcy of the Royal Cloak Company at Trustee's sale on January 25 and 26, 1932 (R. 99–100); all of which was done upon advice of counsel pursuant to a plan of reorganization of the Royal Cloak Company and the Klein Clothing Company for the purpose of carrying on the business of those two companies that was being conducted under the name of Klein's in the stores at Peoria, Illinois, and Burlington, Iowa (R. 32–41, 50–54, 64).

The Royal Cloak Company was a corporation organized under the laws of the State of Iowa in the year 1916, and was engaged in the business of retail sales of wearing apparel for women and children and other merchandise, having acquired the assets and business previously established by Harry Klein from 1912 to 1916, at Burlington, Davenport and Keokuk, Iowa. From 1921 to 1929 that company established additional stores in the cities of Rockford and Peoria, Illinois, Dubuque, Davenport, and Cedar Rapids, Iowa, and Bloomington, Streator, Moline and Chicago, Illinois (R. 100).

Early in 1930, the Royal Cloak Company became involved in financial difficulties because of the general business depression and during the fiscal year ended January 31, 1931, it suffered an operating loss of approximately $83,000.00 (R. 61, 101). The management undertook to effect certain economies by closing its stores in certain of the cities (R. 101). Also additional

working capital was provided. On June 15, 1931, by resolution of the stockholders, the Articles of Incorporation were amended to increase the authorized capital stock to $400,000, dividing it into three classes, Class A and Class B preferred stock, and common stock (R. 59). Mrs. D. W. Klein purchased 450 shares of Class A Preferred stock for $45,000 cash, which was all of that class of stock that was issued, and which was an emergency capital financing. The Class A preferred stock was preferred over all other classes of stock both as to dividends and as to assets of the corporation in liquidation or dissolution (R. 60–61).

The capital stock structure of the Royal Cloak Company and the stockholdings from July 31, 1931, to liquidation of the company in bankruptcy were as follows (R. 100):

	Common. Par Value $1.00	*Preferred B. Par Value $100*	*Preferred A. Par Value $100*
Authorized	50,000	250,000	100,000
Issued and outstanding	50,000	225,000	45,000
Stockholder	*Shares*	*Shares*	*Shares*
Harry Klein	20,000	1,725	None
M. A. Klein	9,000	90	None
Louis E. Klein	9,000	80	None
J. B. Klein	7,000	140	None
David S. Klein	5,000	75	None
Della W. Klein	None	None	450
	50,000	2,110	450
Treasury Stock		140	

The Klein Clothing Co. was a corporation organized under the laws of Illinois in 1922, first named the Klein-Hunt Co., and later changed to Klein Clothing Co., the object of which was to conduct a business in Peoria, Illinois, for the sale of men's clothing and furnishings. That company originally had an authorized capital stock of 300 shares, increased in 1923 to 500 shares, of the par value of $100 per share, and there were outstanding in 1931 and until its assets were distributed in complete liquidation on February 25, 1932, 350 shares of a total par value of $35,000, all of which had been issued for cash, and of which 348 shares were owned by the Royal Cloak Co. (R. 56, 101).

Notwithstanding the additional financing of the Royal Cloak Company in June, 1931, that corporation continued to lose money because of the general business depression, and it became necessary to effect some further economies and to reorganize the business; as a result of which consideration was given to closing certain of the unprofitable stores on which the company was carrying very heavy, burdensome leases. Therefore, in October, 1931, the management submitted to its counsel a plan for the creation of a new corporation that would take over the assets of the two stores in Peoria and Burlington and allow the old company to close the remaining stores in other cities, cancel the leases on buildings occupied by those stores, and liquidate the the assets. Counsel advised that no assets of the company such as the Peoria and Burlington stores could be transferred to a new company without incurring liability for payment of the obligations arising under the leases of the closed stores, so that plan was not adopted (R. 61–62, 101).

Thereupon, the management upon the recommendation of Mr. Harry Dale Morgan, a member of the law firm of Todd, Morgan, Pendarvis and Arber, of Peoria, Illinois, counsel for the corporation, gave consideration to a suggested plan whereby the assets would be transferred to a trustee for the benefit of creditors under a common law assignment (R. 101), some of which assets could be liquidated to pay off the creditors, and the problem of the unprofitable stores could be worked out over a period of time, thus effecting the payment of the creditors in full and continuing the business of the two principal stores located in Peoria and Burlington (R. 62). Counsel approved that plan, a trustee was selected, and on November 14, 1931, the company executed a common law assignment for the benefit of creditors and notice was given to all creditors (R. 101). The trustee took custody of the assets and business immediately, but on November 17, 1931, counsel and the management learned that certain persons in Chicago were buying up claims against the company for the purpose of instituting involuntary bankruptcy proceedings in Iowa; whereupon counsel advised with the officers and stockholders and recommended

a modification of the plan to meet that situation (R. 33), which was a plan for the company to file a voluntary petition in bankruptcy in the Federal Court in Illinois, arrange for the appointment of the same trustee who was acting under the common law assignment for the benefit of creditors, and have him continue the operation of the stores during bankruptcy proceedings (R. 33). The stockholders could thus work out the same plan of reorganization of the business as they had intended under the common law assignment of the assets for the benefit of creditors. Counsel advised the stockholders that by continuing the operation of the stores they would preserve the business as a going and operating concern, that they could bid in the assets at the trustee's sale and turn the operation of the stores over to a new company as a going business and thus retain the goodwill and collect a substantial part of the outstanding accounts receivable (R. 33–34, 64–65).

The summary statement of the assets and liabilities showed that the assets were approximately $120,000 in excess of the debts, but any person who purchased the assets at the trustee's sale necessarily had to continue the operation of the stores in order to realize the full value of the open accounts receivable and merchandise on hand, because from their experience in closing other stores the management knew that little or nothing would be realized on the outstanding accounts receivable if the business were entirely liquidated and the stores closed (R. 64–65).

The Receiver and Trustee closed all of the stores except those at Burlington and Peoria, and removed to those two stores all accounts receivable of the closed stores, and all merchandise and movable fixtures of the closed stores, except those at Davenport and Dubuque (R. 63, 102). The Peoria and Burlington stores thereafter continued in operation under the management of the Trustee until January 25 and 26, 1932, when he sold at public auction all the merchandise, fixtures and accounts receivable that belonged to and had been removed to those two stores; and D. W. Klein, the sole Class A preferred stockholder, acting through an agent, acquired the said assets

for the bid price of $45,625.00 (R. 102). On January 27, 1932, the Trustee sold the 348 shares of capital stock of the Klein Clothing Co. to Mrs. Klein for $6,500 (R. 102). These were substantially 70 to 75 per cent of all the assets of the Royal Cloak Company and its subsidiary (R. 62). Mrs. Klein paid the Trustee $20,000.00 in cash, executed her promissory notes for the balance of $32,125.00, took possession of the properties as of January 25, 1932, and continued the operation of the stores under the same management until they were transferred to petitioner in February, 1932, in exchange for 2,085 shares of common stock of the aggregate par value of $52,125.00, and for the assumption of Mrs. Klein's promissory notes of $32,125.00 (R. 102–103), which notes the petitioner thereafter paid.

The value of the assets when received by petitioner from D. W. Klein was not less than $84,250 free from liabilities (R. 104).

The assets of the Royal Cloak Company were recorded on the books of petitioner as of the date of January 25, 1932, at the following values:

Inventory of merchandise	$39,643.79
Accounts Receivable	83,851.16
Furniture and Fixtures	12,500.00

The Klein Clothing Co. assets were recorded on the books as of the date of February 1, 1932, at a value of $32,518.02 (R. 104).

The petitioner filed two returns of net income beginning with the operations of the business from date of acquisition of the stores by D. W. Klein—one return for the short period January 25 to January 31, 1932, and the other return for the twelve months, February 1, 1932, to January 31, 1933 (R. 103).

During the taxable year 1933, petitioner collected $73,200.59 of the said outstanding accounts receivable, arising from sales which had been returned previously as gross income of the Royal Cloak Company on the accrual basis, and which amounts were credited to surplus (R. 105). The Commissioner in computing the deficiency in tax has added that amount to petition-

er's income upon the theory that the said assets were not acquired by petitioner in connection with a nontaxable reorganization, and the Board of Tax Appeals and the Circuit Court have approved that action. The Commissioner has likewise, and for the same reason, adjusted the basis for determining gain or loss and depreciation of all other assets and for the deduction of bad debts on account of the accounts taken over from the Royal Cloak Company, and the Board of Tax Appeals and the Circuit Court have approved that action (R. 106–107). The Commissioner and the Board have held that the basis for gain or loss and depreciation of the said assets is the cost to Mrs. D. W. Klein, as transferor to petitioner, $45,625 for the Royal Cloak assets, and $6,500 for the Klein Clothing Co. assets and the Circuit Court has approved that action (R. 115–117).

During the fiscal year ended January 31, 1933, petitioner incurred and paid to creditors who had filed claims in bankruptcy against the Royal Cloak Company amounts aggregating $7,909, as set forth in the Board's Findings (R. 106–108) for services in connection with the operation of the business, for payment of a premium on a bank loan, and for service in the purchase of merchandise from manufacturers and jobbers, which amounts were claimed in the proceedings before the Board of Tax Appeals as proper deductions from gross income as ordinary and necessary expenses or as additional costs of goods sold in computing gross profit from sales. The Board and the Circuit Court have denied the deductions on the ground that they were payments made by petitioner to establish good will and lines of credit, and for the further reason that petitioner had no legal obligation to pay the claims of the bankrupt corporation.

SPECIFICATION OF ERRORS.

The United States Circuit Court of Appeals erred

1. In holding that officers and stockholders of a corporation that has been adjudged a bankrupt may not, with the full co-operation of the Trustee in Bankruptcy (whose conduct is approved by the Court) effect a reorganization of its business and property within the meaning of Sections 112(i) and 113 (a) (7) of the Revenue Act of 1932.

2. In holding that petitioner is not entitled to the same basis for the properties acquired that was recognized as the basis in the hands of the prior corporate owner, as provided by Section 113(a) (7) of the Revenue Act of 1932.

3. In holding that the basis of petitioner's property should not be increased by the amount of $32,125 cash paid to D. W. Klein, the transferor, in satisfaction of certain liabilities assumed by petitioner in 1932 upon acquisition of said property by issuance of stock.

4. In failing to hold that the basis of the property acquired by petitioner in 1932 from D. W. Klein was the fair market value ($84,250) thereof, and not the bid price ($52,125) thereof by the Class A preferred stockholder at foreclosure sale of the assets of the bankrupt company.

5. In holding that expenditures made to creditors of the predecessor bankrupt company for current services in connection with the current operation of the business, the purchase of merchandise and the payment of a premium on a bank loan, were not proper deductions from income as ordinary and necessary expenses.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Circuit Court in this case is in conflict with the decisions of this Court announced on February 2, 1942, in the cases of *Helvering* v. *Alabama Asphaltic Limestone Co.*, No. 328, and *Palm Springs Holding Corporation* v. *Commissioner of Internal Revenue*, No. 503, October term, 1941, construing the provisions of Section 112(i)(1)(A) of the Revenue Act of 1928 and Section 112(i)(1)(A) of the Revenue Act of 1932, which are identical. The decision of the Circuit Court in this case is also in direct conflict with its own decisions in *Commissioner* v. *Kitselman*, 89 F. (2d) 458 and *Rex Manufacturing Co.* v. *Commissioner*, 102 F. (2d) 325, as well as the decision of the Sixth Circuit in *Commissioner* v. *Newberry Lumber and Chemical Co.*, 94 F. (2d) 447. The petitioner takes the position that Mrs. D. W. Klein, as sole owner of the Class A preferred stock, had the ownership of the equity in the property of the insolvent company, that the plan of reorganization was conceived and carried through by the medium of voluntary bankruptcy proceedings on advice of counsel to effect a continuation of her interests in the property of the insolvent company, that there was no remaining equity in the assets for participation by the other stockholders, that insolvency reorganizations are within the family of financial readjustments embraced within the terms of Section 112(i)(1)(A) of the statute, and that the separate steps of the plan whereby the assets were bid in by the Class A preferred stockholder at trustees' sale in bankruptcy were integrated parts of a single plan and constituted a "reorganization" within the meaning of the statute, as stated by this Court in *Helvering* v. *Alabama Asphaltic Limestone Co.*, *supra*.

2. The case presents for the first time a question of the construction of a statute, Sec. 213 of the Revenue Act of 1939, which has not heretofore been settled by the Supreme Court. This statute was enacted to nullify the effect of the decision of this Court in *United States* v. *Hendler*, 303 U. S. 564, 58 S.

Ct. 655, 82 L. ed. 1018, in which it was held that in a reorganization the payment of amounts to third parties in discharge by the transferee of liabilities of the transferor was a constructive receipt by the transferor and the equivalent of the receipt of cash or other property, making gain, if any, recognizable by the transferor to the extent of the liabilities assumed. Section 213 of the Revenue Act of 1939 amended Section 112 of the Internal Revenue Code and corresponding provisions of prior revenue laws beginning with the Revenue Act of 1924, to give effect to the long established policy of income tax laws of postponing in certain cases recognition of gain realized in connection with corporate reorganizations, and to permit corporations to continue bona fide business reorganizations without being subject to taxation immediately upon such reorganization by reason of the assumption by one corporation of the debts of the other in the process of reorganization. (See House Report No. 855, 76th Cong., 1st Sess., accompanying H. R. 6851, pages 18–20, and Senate Report No. 648, 76th Cong., 1st Sess., accompanying H. R. 6851, page 3.) The petitioner takes the position that Section 213(f) applies solely to transactions involving corporate reorganizations or non-taxable exchanges where there is a non-recognition of gain, and that it has no application to the basis of property acquired by a transferee corporation by the issuance of stock and the subsequent payment of cash *direct to the transferor* in satisfaction of assumed liabilities at the time of the transfer. Section 113(a)(8) of the Revenue Act of 1932 prescribes that the basis of such property to the transferee is the same as it would be in the hands of the transferor, increased in the amount of gain recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. The *subsequent payment of cash direct to the transferor* for such liabilities assumed, was a gain recognized at that time to the transferor under the 1932 Act, which increased the basis of such property under Section 113(a)(8). The construction of the statute for which petitioner contends has merit, and is consistent with the decisions of this Court interpreting and construing the reorgan-

ization sections of the revenue acts, and is supported by the legislative history of Section 213 of the 1939 Act.

3. The decision below as to the application of the said statute, Section 213 of the Revenue Act of 1939, is in conflict and inconsistent with the principle applied by the Circuit Court of Appeals, Eighth Circuit, in *Helvering* v. *New President Corporation*, 122 F. (2d) 92, 96, in which it is held that the basis to the transferee corporation of assets bid in by a creditor at bankruptcy or receivership sale of an insolvent taxpayer is to be determined by the fair market value of such assets at the time of acquisition, and not the bid price of the creditor. The position taken by petitioner is that a preferred stockholder has a beneficial interest in assets of an insolvent corporation, as well as a creditor or bondholder, and that the basis for such assets acquired by a preferred stockholder at bankruptcy sale and transferred to a new corporation for stock should be the fair market value of such assets, if such value is in excess of the bid price.

4. The decision of the Circuit Court in holding that the expenditures aggregating $7,909 were not proper deductions from income as ordinary and necessary expenses, is in conflict with the decision of the Fifth Circuit in *Harris* v. *Lucas*, 48 F. (2d) 187, and is directly contrary to the principle established by this Court in *Kornhauser* v. *United States*, 276 U. S. 145, 48 S. Ct. 219, 72 L. ed. 505.

WHEREFORE, in order to have the conflict appearing herein and the question of the construction of Section 213 of the Revenue Act of 1939 definitely settled by an authoritative decision of this Court, petitioner respectfully prays that a writ of certiorari may be issued herein directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding said Court to certify and send to this Court on a day certain to be therein designated a full and complete transcript of the record and proceedings of said Circuit Court of Appeals in this case

entitled *The D. W. Klein Company* v. *Commissioner of Internal Revenue*, No. 7634, to the end that said case may be reviewed and determined by this Court as provided by law, and that petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that said judgment of said Circuit Court of Appeals may be reversed by this Honorable Court.

Respectfully submitted,

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